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No. 295

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In the Supreme Court of the United States

OCTOBER TERM, 1960

CHARLOTTE SLAVITT, PETITIONER

v.

GLENN F. MEADER, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

GEORGE COCHRAN DOUB,
Assistant Attorney General,

JOHN G. LAUGHLIN, JR.,
W. HAROLD BIGHAM,
Attorneys,
Department of Justice,
Washington 25, D. C.

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OPINION BELOW

The district court rendered no opinion. The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. 37-39) is reported at 278 F. 2d 276.

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1960 (Pet. App. 40). A timely petition for rehearing *en banc* was denied May 9, 1960 (Pet. App. 41). The petition for a writ of certiorari was

filed on August 4, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the district court abused its discretion in dismissing petitioner's suit for want of diligent prosecution.

STATUTE AND RULES INVOLVED

Title 28, U.S.C., Section 2071, provides:

> *Rule-making power generally.*—The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court.

Rule 83 of the Federal Rules of Civil Procedure provides:

> *Rules by District Courts.*—Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules.

Rule 13 of the United States District Court Rules for the District of Columbia provides in pertinent part:

(a) *Clerk to Warn Dilatory Party; Dismissal Without Prejudice; Notice of.*—If a party seeking affirmative relief fails for five months, from the time action may be taken, to comply with any law, rule or order requisite to the prosecution of his claim, or to avail of any right arising through the default or failure of an adverse party, or to file a Certificate of Readiness under Rule 11(d), within six months from the date the action is called on the call of the civil calendar, the clerk shall warn the dilatory party by mail that his claim will stand dismissed if he fails to comply with this rule, making a note in the docket of the mailing; and if the delinquency continues for six months the complaint, counter-claim, cross-claim or third party complaint of said party, as the case may be, shall stand dismissed without prejudice, whereupon the clerk shall make entry of that fact and serve notice thereof by mail upon every party not in default for failure to appear, of which mailing he shall make an entry.

(b) *Failure to Warn; Effect.*—A failure of the clerk to give the warning as above provided will not affect the running of the six months' period or otherwise relieve a party from operation of this rule.

* * * *

STATEMENT

Petitioner filed her complaint for libel and conspiracy in the District Court for the District of Columbia on August 13, 1953. It named as defendants Lt. Comdr. Meader and Lt. (jg) Negri of the United States Purchasing Office, Washington, D. C., together with other persons unknown to her (J. App.

4-14).[1] The complaint was based upon an allegedly defamatory letter sent to petitioner by her supervisor, which called to her attention certain deficiencies in her work as a contract negotiator for the Navy Department (J. App. 4-16). The defendants were alleged to have participated in the preparation of the letter.

Lt. Negri was served on August 14, 1953; and on September 21, 1954, Raymond G. Busby, a civilian employee of the Navy Purchasing Office, was served pursuant to an amended complaint (J. App. 1, 2). Lt. Negri filed an answer on September 3, 1953, averring, *inter alia*, failure to state a claim upon which relief could be granted, absolute and qualified privilege, and truth (J. App. 1, 23-24). Busby filed an answer on September 30, 1954, incorporating Negri's defenses and adding the statute of limitations (J. App. 2, 48-49). Since the amended complaint was filed against Busby, the only step taken by petitioner to prosecute her action has been to obtain repeated alias summons for Lt. Comdr. Meader, all returned "not found" (J. App. 53).

Local Rule 13 of the district court (*supra*, p. 3) authorizes the clerk to dismiss without prejudice for failure to take certain steps in the prosecution of an action. On March 3, 1954, petitioner's complaint was dismissed without prejudice under that rule (J. App. 2). On April 26, 1956, upon the agreement of petitioner's co-counsel to discontinue the action as to

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[1] "J. App." refers to the joint appendix in the court of appeals.

Meader, the complaint was dismissed as to him, and on April 27th the action was reinstated as to defendant Negri (J.A. 2, 41-42). Upon learning of the discontinuance as to Meader, petitioner dismissed her co-counsel and, by order of August 2, 1954, the court granted her motion to vacate the order of April 26, 1954, and reinstated the action against Meader (J.A. 2, 42-43).

In August 1956, February 1957, and February 1958, the clerk of the district court warned petitioner that if she failed to comply with Rule 13, her complaint would be dismissed (J. App. 3). On March 10, 1959, no action at all having been taken for one year, the clerk again dismissed the case without prejudice under Rule 13 (J.A. 3).

On March 31, 1959, petitioner moved under Federal Rule of Civil Procedure 60(b) to vacate the clerk's entry of dismissal and to reinstate the action (J. App. 52). The district court denied the motion, finding that petitioner had failed to prosecute her claim with due diligence and had not shown excusable neglect for such failure (J. App. 64). The court of appeals unanimously affirmed (Pet. App. 37-39). The court held that the entire history of this litigation "amply justified the [district] court in finding that appellant had failed to prosecute her action with due diligence" and that there was no abuse of discretion in permitting the dismissal to stand (Pet. App. 39). Since the court of appeals "construe[d]" the district court's action as an "exercise of the court's inherent power to dismiss the action for lack of prosecution," it found it unnecessary to consider whether the dis-

missal was properly made under local Rule 13, or whether that rule is valid (Pet. App. 38-39).

ARGUMENT

This case presents only the narrow question whether the district court abused its discretion in refusing to vacate the dismissal of petitioner's suit for failure to prosecute with due diligence. The question turns on facts peculiar to this case and clearly does not warrant further review by this Court. The history of this case, moreover, leaves no room for doubt that the decisions below are correct.[2]

When dismissed on March 10, 1959, petitioner's suit had been pending in the district court for over five and one-half years. It was no nearer to trial in 1959 than it had been four and one-half years earlier, when, in September 1954, service was obtained on defendant Busby. At no time during this period did petitioner move for a severance as to defendants Busby and Negri, who were within the court's jurisdiction. And, although in August 1956, February 1957, and February 1958, petitioner was warned of impending dismissal under local Rule 13 for want of diligent prosecution (*supra*, p. 5), the only steps she took were to have process issued for defendant Meader and to attempt to have a guardian *ad litem* appointed for him, although she knew Meader was beyond the reach of judicial process. In the light of these circumstances, petitioner plainly

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[2] *Boling* v. *United States*, 231 F. 2d 926 (C.A. 9); *Ordnance Gauge Co.* v. *Jacquard Knitting Machine Co.*, 21 F. R. D. 575.

has not prosecuted her action with due diligence. In the absence of any showing of excusable neglect (Rule 60(b), Fed. Rules Civ. Proc.)—and she has made none here—the court of appeals correctly affirmed the refusal of the district court to vacate the dismissal of March 10, 1959.[3]

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[3] The court of appeals was fully warranted in construing the district court's refusal to vacate the dismissal as "including a decision made in the exercise of the [district] court's inherent power to dismiss the action for lack of prosecution" (Pet. App. 38). Even apart from rule or statute, a district court has inherent power to dismiss an action for failure to prosecute with reasonable diligence. *Shotkin* v. *Westinghouse Electric & Mfg. Co.*, 169 F. 2d 825, 826 (C.A. 10); *American Nat'l Bank & Trust Co.* v. *United States*, 142 F. 2d 571 (C.A. D.C.); *Hicks* v. *Bekins Moving & Storage Co.*, 115 F. 2d 406 (C.A. 9). Since the district court's action thus did not rest upon Rule 13, the court of appeals correctly found it unnecessary to consider petitioner's arguments about the validity and construction of that rule.

In any event, we submit that Rule 13 is valid, both as an implementation of the district court's inherent power to dismiss for non-prosecution and as an exercise of the power of the district courts to "prescribe rules for the conduct of their business" (28 U.S.C. 2071; Rule 83, Fed. Rules Civ. Proc.). See 5 Moore, *Federal Practice* (2d Ed.), p. 1036. To the extent that petitioner attacks the Rule because it permits the clerk, rather than the court, to dismiss, and also challenges the procedure here followed by the clerk, the short answer is that the district court, by refusing to reinstate the complaint, confirmed and adopted the action of the clerk.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

JOHN G. LAUGHLIN, JR.,
W. HAROLD BIGHAM,
Attorneys.

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